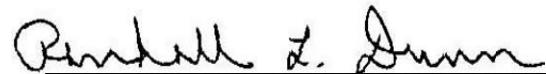


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5 Below is an Opinion of the Court.  
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RANDALL L. DUNN  
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF OREGON

In Re: ) Bankruptcy Case  
BAY CLUB PARTNERS-472, LLC, ) No. 14-30394-rlld11  
                                  ) )  
                                  ) MEMORANDUM OPINION  
Debtor.                    )

On March 6, 2014, secured creditor Legg Mason Real Estate CDO I, Ltd. ("Legg Mason") filed a motion to dismiss, Docket No. 59 ("Motion to Dismiss"), the debtor Bay Club Partners-472, LLC's ("Bay Club") chapter 11 case for cause pursuant to § 1112(b).<sup>1</sup> Legg Mason argued that Bay Club's LLC operating agreement prohibited it from filing for bankruptcy protection, and Bay Club's Manager further was not authorized to file for bankruptcy protection without the affirmative votes of 100% of the LLC members. Trail Ranch Partners, LLC ("Trail Ranch"), a 20% member owner in Bay Club, joined in the Motion to Dismiss, Docket No. 62.

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<sup>1</sup> Unless otherwise indicated, all chapter and section references are to the federal Bankruptcy Code, 11 U.S.C. §§ 101-1532; all "Rule" references are to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037; and all "Civil Rule" references are to the Federal Rules of Civil Procedure.

1 Trail Ranch's joinder initially was filed by Mr. Leonard Brown, its  
2 Managing Member ("Mr. Brown"), but ultimately, Trail Ranch filed a  
3 joinder motion by counsel, Docket No. 130. Bay Club filed an opposition  
4 to the Motion to Dismiss, Docket No. 127.

5 I held the final evidentiary hearing ("Hearing") on the Motion  
6 to Dismiss on April 23, 2014. After admitting exhibits and hearing  
7 testimony and argument, I took the matter under submission. Since the  
8 Hearing, I have reviewed the Motion to Dismiss and all supporting and  
9 opposing documents. I further have reviewed all admitted exhibits and my  
10 notes from the hearing. I have considered carefully the evidence and  
11 arguments presented. I also have taken judicial notice of all relevant  
12 entries on the docket of Bay Club's chapter 11 case for the purpose of  
13 ascertaining facts not reasonably in dispute. Federal Rule of Evidence  
14 201; In re Butts, 350 B.R. 12, 14 n.1 (Bankr. E.D. Pa. 2006). In  
15 addition I have reviewed relevant legal authorities, both as cited to me  
16 by the parties and as located through my own research.

17                   Based on that consideration and review, I will deny the Motion  
18 to Dismiss for the reasons stated in this Memorandum Opinion. Following  
19 are my findings of fact and conclusions of law under Civil Rule 52(a),  
20 applicable with respect to this contested matter under Rules 7052 and  
21 9014.

## I. Relevant Facts

23 Bay Club was formed as an Oregon limited liability company in  
24 2005 to acquire, renovate and operate a large apartment complex in Mesa,  
25 Arizona (the "Property"). On or about November 15, 2005, Legg Mason's  
26 predecessor in interest loaned Bay Club \$23,600,000 (the "Loan"),

1 evidenced by a promissory note ("Note"), to acquire the Property.

2 Repayment of the Loan is secured by a deed of trust on the Property.

3                   The Loan terms were modified four times, ultimately resulting  
4 in the principal balance of the Note being increased to \$24,000,000 and  
5 the maturity date being extended to March 1, 2014. However, by early  
6 2014, negotiations for further forbearance and modifications with  
7 respect to the Loan between Bay Club and Legg Mason apparently broke  
8 down. On January 17, 2014, Bay Club received a notice of default on the  
9 Loan obligation from Legg Mason, and Legg Mason offset against the Loan  
10 debt Bay Club's reserve accounts for taxes, insurance and capital  
11 expenses for the Property in an amount totaling \$345,006.68. See  
12 Disclosure Statement, Docket No. 116, p.12.

13                   Bay Club filed its chapter 11 petition on January 28, 2014.

14 The petition was signed by Mr. David Butler ("Mr. Butler") on behalf of  
15 Bay Club Management, LLC as Bay Club's Manager. See Exhibit E, p.3. A  
16 Written Consent and Resolutions of Bay Club members ("Consent  
17 Resolution"), dated January 21, 2014, was prepared to document  
18 authorization of Bay Club's chapter 11 filing. See Exhibit 8. The  
19 Consent Resolution was signed in behalf of three of Bay Club's four  
20 members, representing 80% of Bay Club's member ownership interests.  
21 However, the evidentiary record is clear that no representative of Trail  
22 Ranch signed the Consent Resolution, even though Mr. Brown was repeatedly  
23 asked to do so. In fact, Trail Ranch opposed Bay Club's bankruptcy  
24 filing. See Exhibit 7.

25                   Oregon limited liability companies ("LLC's") are governed by  
26 Oregon Revised Statutes ("ORS") Chapter 63. ORS § 63.130 recognizes two

1 types of management arrangements for LLC's: 1) management by the members  
2 (ORS § 63.130(1)); and 2) management by a manager (ORS § 63.130(2)). Bay  
3 Club is a manager-managed LLC. See Exhibit A, p.2, section 4.1. In a  
4 manager-managed LLC, ORS 63.130(2)(b) provides, with exceptions that do  
5 not apply in the circumstances before me, that "any matter relating to  
6 the business of the limited liability company may be exclusively decided  
7 by the manager . . . ."

8 Bay Club has a Limited Liability Company Operating Agreement  
9 ("Operating Agreement") that provides for the management of its business  
10 affairs, as authorized by ORS § 63.057. See Exhibits A and 2. Under  
11 Section 4.1 of the Operating Agreement, entitled "Management," the  
12 Manager

13 shall have the sole and exclusive authority to manage  
14 the Company and to make any contracts, enter into any  
15 transactions, and make and obtain any commitments on  
16 behalf of the Company to conduct or further the  
17 Company's business. The affirmative consent  
18 (regardless of whether written, oral, or by course of  
19 conduct) of the Manager shall constitute the sole  
20 requisite consent for purposes of any provision of  
21 this Agreement or the Act, excepting only the  
22 dissolution of the Company which shall require the  
23 consent of a majority in interest of the Members. All  
24 other decisions concerning the business affairs of the  
Company shall be made by the Manager. The Manager  
shall have the power to bind the Company as provided  
in this Article. The act of the Manager, regardless  
of whether such action is for the purpose of  
apparently carrying on in the usual way the business  
or affairs at the Company, including the exercise of  
authority indicated in this Article, shall bind the  
Company and no person dealing with the Company shall  
have any obligation to inquire into the power or  
authority of the Manager acting on behalf of the  
Company. . . .

25 However, in spite of the breadth of the Manager's authority to manage the  
26 business affairs of Bay Club, as set forth in Section 4.1 of the

1 Operating Agreement, significant restrictions on Bay Club's business and  
2 operating decisions are imposed in Article XI of the Operating Agreement,  
3 entitled "Special Purpose Entity Restrictions."

4 Section 11.1, entitled "Negative Covenants with Respect to  
5 Indebtedness, Operations and Fundamental Changes of Company," provides a  
6 preamble to specific restrictions and states as follows:

7 The Company intends to borrow money with which to  
8 acquire the Property, and to pledge the Property and  
9 related assets as security therefor. Until such time  
as the indebtedness secured by that pledge is paid in  
full, the Company:

10 Thereafter, Section 11.1.24 of the Operating Agreement sets forth the  
11 restrictions of particular relevance to the Motion to Dismiss:

12 [Bay Club] shall not institute proceedings to be  
13 adjudicated bankrupt or insolvent; or consent to the  
14 institution of bankruptcy or insolvency proceedings  
15 against it; or file a petition seeking, or consent to,  
16 reorganization or relief under any applicable federal  
17 or state law relating to bankruptcy; or consent to the  
18 appointment of a receiver, liquidator, assignee,  
trustee, sequestrator (or other similar official) of  
the Company or a substantial part of the Company's  
property; or make any assignment for the benefit of  
creditors; or admit in writing its inability to pay  
its debts generally as they become due; or take any  
action in furtherance of any such action.

19 Although representatives of all members of Bay Club at the time  
20 signed the Operating Agreement (see Exhibits A and 2, p.17), no testimony  
21 or evidence was introduced that the members or their representatives  
22 discussed the restrictive provisions of Article XI on or before the date  
23 that they signed the Operating Agreement. Mr. Dean Alterman, who served  
24 as counsel to Bay Club with respect to its organization and prepared the  
25 Operating Agreement, testified that the restrictive provisions of Article  
26 XI of the Operating Agreement were included at the request of Legg Mason.

## II. Standing

At the outset, I need to deal with Bay Club's argument that as a creditor, Legg Mason had no standing to file and prosecute the Motion to Dismiss. Courts around the country are split on the question of whether creditors have standing to challenge a business entity bankruptcy filing on the ground that it was not properly authorized. Section 1109(b) provides that "[a] party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee, may raise and may appear and be heard on any issue in a case under this chapter."

12                   In spite of the expansive language of § 1109(b), some courts  
13 outside of the Ninth Circuit have held that creditors do not have  
14 standing to seek dismissal of a business entity's bankruptcy filing,  
15 based in part on the pre-Bankruptcy Code decision of the Supreme Court in  
16 Royal Indem. Co. v. Am. Bond & Mortg. Co., 289 U.S. 165, 171 (1933), and  
17 the argument from policy that a creditor's motion to dismiss is the  
18 product more of self interest than of concern for what would be best for  
19 the creditor body as a whole. See, e.g., In re John Hicks Chrysler-  
20 Plymouth, Inc., 152 B.R. 503, 510 (Bankr. E.D. Tenn. 1992); Still v.  
21 Fundsnet, Inc. (In re Sw. Equip. Rental), 152 B.R. 207 (Bankr. E.D. Tenn.  
22 1992); In re Prof'l Success Seminars Int'l, Inc., 18 B.R. 75 (Bankr. S.D.  
23 Fla. 1982).

24 On the other hand, other courts basically have applied  
25 § 1109(b) according to the plain meaning of its terms and have recognized  
26 creditor standing to proceed with a motion to dismiss based on improper

1 or inadequate authorization for a bankruptcy filing. See, e.g., In re  
2 Orchard at Hansen Park, LLC, 347 B.R. 822 (Bankr. N.D. Tex. 2006); In re  
3 A-K Enters., Inc., 111 B.R. 149 (Bankr. N.D. Ohio 1990); In re Giggles  
4 Rest., Inc., 103 B.R. 549 (Bankr. D.N.J. 1989).

5 In the Ninth Circuit, Fondiller v. Robertson (In re Fondiller),  
6 707 F.2d 441, 442 (9th Cir. 1983), states the classic standard as to  
7 standing with respect to bankruptcy matters: Only those persons or  
8 entities "who are directly and adversely affected pecuniarily" by a  
9 bankruptcy proceeding have standing to appear and be heard.

10 In this case, Legg Mason has a direct pecuniary interest in  
11 whether Bay Club can proceed to attempt to confirm a plan in chapter 11.  
12 Legg Mason is the primary, if not the only, secured creditor in the case.  
13 The total of all other debts, of all types, scheduled by Bay Club is  
14 dwarfed by the unpaid Loan debt. See Summary of Schedules, Docket No.  
15 39. Bay Club's bankruptcy filing was precipitated by Legg Mason's notice  
16 of default and the impending maturity date of the Loan obligation. In  
17 these circumstances, it is no surprise that in its plan of  
18 reorganization, Bay Club seeks to lower the interest rate and extend the  
19 maturity date of the Loan debt. See Plan of Reorganization, Docket No.  
20 115, p.8. Legg Mason has a pecuniary interest that inevitably will be  
21 adversely impacted by Bay Club's bankruptcy filing. In spite of its  
22 clear self interest, I conclude that Legg Mason has standing to prosecute  
23 the Motion to Dismiss, based on the straightforward provisions of  
24 § 1109(b) and the pecuniary interest test of the Fondiller decision.

25 Even if I did not conclude that Legg Mason had standing, in any  
26 event, Trail Ranch has standing to prosecute its "me, too" motion to

1 dismiss as a member of Bay Club. Accordingly, I will proceed to consider  
2 the merits of the Motion to Dismiss.

III. Prepetition Waivers of Bankruptcy Protection are Contrary to Public Policy

5           Much of the parties' argument at the Hearing focused on whether  
6 the restrictions in Article XI of the Operating Agreement, particularly  
7 the provisions of Section 11.1.24 prohibiting Bay Club from initiating a  
8 bankruptcy case, were consistent with Oregon LLC law. However, my  
9 ultimate conclusion is that the disposition of this matter is governed by  
10 federal law.

11                   The Ninth Circuit has been very clear that a debtor's  
12 prepetition waiver of the right to file a bankruptcy case is  
13 unenforceable because it is a violation of public policy.

It is against public policy for a debtor to waive the prepetition protection of the Bankruptcy Code. Hayhoe v. Cole, 226 B.R. 647, 651-54 (9th Cir. B.A.P. 1998). This prohibition of prepetition waiver has to be the law; otherwise, astute creditors would require their debtors to waive.

18 Bank of China v. Huang (In re Huang), 275 F.3d 1173, 1177 (9th Cir.  
19 2002). Continental Ins. Co. v. Thorpe Insulation Co. (In re Thorpe  
20 Insulation Co.), 671 F.3d 1011, 1026 (9th Cir. 2012) (same); Wank v.  
21 Gordon (In re Wank), 505 B.R. 878, 887-88 (9th Cir. BAP 2014).

22 No evidence or argument was presented to the effect that Legg  
23 Mason insisted on a bankruptcy waiver in its Loan agreements. What the  
24 evidence established in this case is more cleverly insidious. Legg Mason  
25 requested that the bankruptcy waiver of Section 11.1.24 of the Operating  
26 Agreement be included with its requests for other restrictive covenants

1 in Article XI, and the bankruptcy waiver provision apparently was  
2 included in the Operating Agreement without discussion among the members.  
3 The purpose of the bankruptcy waiver provision to prevent a bankruptcy  
4 filing while any amount was owed on the Loan debt is clear from the  
5 provision of Section 11.1 of the Operating Agreement that the restrictive  
6 covenants of Article XI would only be effective "[u]ntil such time as the  
7 [Loan] indebtedness secured by that pledge is paid in full." That the  
8 members of Bay Club signed the Operating Agreement among themselves  
9 rather than acquiescing in the bankruptcy waiver provision in a Loan  
10 agreement with Legg Mason is a distinction without a meaningful  
11 difference. The bankruptcy waiver in Section 11.1.24 of the Operating  
12 Agreement is no less the maneuver of an "astute creditor" to preclude Bay  
13 Club from availing itself of the protections of the Bankruptcy Code  
14 prepetition, and it is unenforceable as such, as a matter of public  
15 policy.

IV. Bay Club's Chapter 11 Filing was Properly Authorized by the Manager

18                   With my conclusion that the bankruptcy waiver provision of  
19 Section 11.1.24 of the Operating Agreement is not enforceable, the  
20 question as to whether Bay Club's chapter 11 filing was properly  
21 authorized refocuses on the authority of its Manager under Section 4.1 of  
22 the Operating Agreement.

23                   Section 4.1 authorizes the Manager to take any actions to  
24 further Bay Club's business interests, both in and outside of the  
25 ordinary course. Bay Club did go to the trouble of trying to obtain  
26 agreement of all of its members to its chapter 11 filing and requested

that they all sign the Consent Resolution. Trail Ranch refused to sign.

However, I find that Mr. Butler credibly explained that attempting to get all members to sign off on the Consent Resolution was an effort to avoid the costs and difficulties from such proceedings as the Motion to Dismiss. That effort takes nothing from the Manager's authority to take all actions necessary to further the business interests of Bay Club under Section 4.1 of the Operating Agreement. I find that the Manager had the authority under Section 4.1 of the Operating Agreement to initiate a chapter 11 case on Bay Club's behalf, and I conclude that Bay Club's bankruptcy filing was properly authorized. Accordingly I will deny the Motion to Dismiss.

Counsel for Bay Club should submit an order denying the Motion to Dismiss for the reasons stated in this Memorandum Opinion within ten days following its entry on the docket.

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cc: Bay Club Partners-472, LLC  
Albert N. Kennedy, Esq.  
Carolyn J. Johnsen, Esq.  
Laura J. Walker, Esq.  
U.S. Trustee